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NOT TO BE PUBLISHED IN OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FIRST APPELLATE DISTRICT

DIVISION ONE

Estate of HANS HERBERT BARTSCH, Deceased.	
NORMAN BARTSCH HERTERICH, Objector and Appellant, v. ARNDT PELTNER, as Executor, etc., Defendant and Respondent.	A151783 (San Francisco County Super. Ct. No. PES-082-91846)

This is the sixth appeal by appellant Norman Bartsch Herterich involving the estate of his father, decedent Hans Herbert Bartsch (Estate). We previously upheld the probate court's determination that appellant has no claim to the Estate as a pretermitted child. We affirmed the trial court's summary judgment order dismissing a separate civil fraud action brought by appellant against Arndt Peltner, the executor of the Estate, and Peltner's attorney, Alice Brown Traeg. We dismissed two other appeals after concluding appellant lacked standing because he has no interest in the Estate. Our orders made clear that dismissal was required under the law of the case and that we would not revisit our prior rulings. Undeterred, appellant moved to set aside orders entered by the probate court more than a decade ago. He now appeals from the denial of his motion. We conclude, once again, that appellant does not have standing to raise this appeal and

dismiss it for lack of jurisdiction. We also order sanctions for pursuing this frivolous appeal in the amount of $5,950, payable to Peltner, in his capacity as executor.[1]

FACTUAL AND PROCEDURAL BACKGROUND

I. History of Litigation

As we stated previously, "[t]he background to this case is well known to this court and the parties." (*Herterich v. Peltner* (2018) 20 Cal.App.5th 1132, 1135 (*Herterich*).) This litigation concerns Bartsch's will, which does not name appellant or designate him to receive any share of the Estate. We take judicial notice of our prior opinions and orders[2] and summarize the pertinent facts.

Bartsch's will was admitted to probate in December 2008. In April 2009, appellant filed a pretermission petition seeking to obtain the Estate under the theory that he is Bartsch's son and had been unintentionally omitted from his father's will. In December 2011, the probate court granted executor Peltner's motion for summary judgment after finding that appellant was not a pretermitted heir and had been intentionally disinherited by Bartsch. Appellant filed a notice of appeal.

While the appeal was pending, appellant filed a civil fraud action against Peltner and Traeg, alleging they committed fraud by filing a petition to administer the probate of the Estate that falsely asserted Bartsch had no children, and by failing to serve him with notice of the petition when they knew or should have known that appellant was decedent's son and was entitled to notice. (See *Herterich*, *supra*, 20 Cal.App.5th at

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[1] Appellant has since filed three more appeals in this matter. By separate order, we will order the parties to brief why these appeals should not be dismissed for lack of standing.

[2] *Estate of Bartsch* (2011) 193 Cal.App.4th 885 (*Bartsch I*), *Estate of Bartsch* (Jan. 30, 2014, A135322 [nonpub. opn.]) (*Bartsch II*), *Peltner v. Herterich* (A136646, dism. Apr. 28, 2015), *Herterich v. Peltner* (A143565, dism. Apr. 28, 2015), *Herterich*, *supra*, 20 Cal.App.5th 1132.

p. 1136.) Such actions, appellant alleged, deprived him of the opportunity to object or to assert a claim against the Estate.

In 2014, we affirmed the probate court's ruling that appellant was not a pretermitted heir. We "conclude[d] that the trial court properly found there is no triable issue of fact as to whether decedent was unaware of objector's birth," observing "it stretches credulity to posit that after making approximately 228 monthly child support payments, decedent would have lost all awareness of objector's birth or of his status as objector's presumed father." (*Bartsch II*, *supra*, A135322, at pp. *11–*12.) We accordingly held that "the court properly concluded he is not entitled to a share of the estate as an omitted child." (*Id*. at p. *11.)

The following year, we dismissed two other appeals filed by appellant challenging the probate court's orders approving payment of Peltner's attorney fees and expenses, and approving the sale of two parcels of real property owned by the Estate. (*Peltner v. Herterich, supra*, A136646; *Herterich v. Peltner*, *supra*, A143565.) Because *Bartsch II* had conclusively established that appellant has no interest in the Estate, we concluded appellant lacked standing. Our orders noted *Bartsch II* is the law of the case.

Peltner and Traeg successfully moved for summary judgment in the civil fraud action. (*Herterich*, *supra*, 20 Cal.App.5th at p. 1137.) In March 2018, we affirmed both of the trial court's judgments, holding that appellant's claims were barred by the litigation privilege under Civil Code section 47, subdivision (b). (*Herterich*, at p. 1135.)

II. The Present Appeal

Appellant's present appeal is from the probate court's order denying his motion to set aside probate orders under Probate Code section 8007.[3] On March 3, 2017, appellant filed a motion to set aside the probate court's December 2008 orders admitting Bartsch's

[3] An order denying a motion to set aside an order admitting a will to probate is an appealable order. (*Estate of Estrem* (1940) 16 Cal.2d 563, 566.) All further undesignated statutory references are to the Probate Code.

will to probate and appointing Peltner as executor. The motion asserted that extrinsic fraud was present in the procurement of the orders, statutory notice of the probate proceedings had not been satisfied, appellant was deprived of a fair hearing, and the orders were void.

The probate court denied appellant's motion. The court found that appellant had filed an untimely motion and had waived any notice defects by making a general appearance in the probate proceeding with his April 2009 pretermission petition.[4] The court also determined that the orders were not void because appellant has been given many opportunities to appear and contest the petition, as evidenced by his numerous challenges and appeals relating to this matter.

Appellant filed a notice of appeal from the April 21, 2017 order. On August 2, 2017, Peltner filed a motion to dismiss the appeal on the basis that appellant has no standing because he has no beneficial interest in the Estate, relying in part on our prior dismissal orders. Peltner also requested that we impose monetary sanctions for the filing of a frivolous appeal. Appellant opposed the motion to dismiss, and asserted he had standing to appeal, in part, because he "has been assigned testate distribution rights." He claimed Peltner's motion to dismiss was frivolous, and asked that Peltner be sanctioned for bringing it.

On September 1, 2017, we denied Peltner's motion to dismiss and denied appellant's motion for sanctions. We notified the parties that Peltner's request for sanctions would be considered along with this appeal.

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[4] Under section 8270, subdivision (a) of the Probate Code, a petition to revoke the probate of a will must be brought within 120 days after the will is admitted to probate. Under Code of Civil Procedure section 473, subdivision (b), a motion to set aside an order must be brought within a reasonable time, but in no case more than six months after the order was entered. Rather than file a timely motion under either of the preceding statutes, appellant elected to file a pretermission petition instead.

DISCUSSION

I. The Appeal Must Be Dismissed

We revisit the question of standing and conclude this appeal must be dismissed because appellant is not an "aggrieved party" within the meaning of Code of Civil Procedure section 902.[5]

Whether a party has standing to appeal is a question of law. (*IBM Personal Pension Plan v. City and County of San Francisco* (2005) 131 Cal.App.4th 1291, 1299.) An appeal may be taken on an appealable order or judgment, but only by those who have standing to appeal, which is jurisdictional. (*Sabi v. Sterling* (2010) 183 Cal.App.4th 916, 947.) "Standing to appeal is 'jurisdictional and therefore cannot be waived.' " (*Marsh v. Mountain Zephyr, Inc.* (1996) 43 Cal.App.4th 289, 295.) If a party has no standing to appeal, this court has no jurisdiction to entertain the appeal and must dismiss.

"Not every party has standing to appeal every appealable order. Although standing to appeal is construed liberally, and doubts are resolved in its favor, only a person aggrieved by a decision may appeal." (*In re K.C.* (2011) 52 Cal.4th 231, 236.) "One is considered 'aggrieved' whose rights or interests are injuriously affected by the judgment. [Citations.] Appellant's interest ' "must be immediate, pecuniary, and substantial and not nominal or a remote consequence of the judgment." ' " (*County of Alameda v. Carleson* (1971) 5 Cal.3d 730, 737.) In probate matters, standing to appeal requires that a party "hav[e] an interest recognized by law in the subject matter of the judgment, which interest is injuriously affected by the judgment . . . ." (*Estate of Colton* (1912) 164 Cal. 1, 5.)

As we previously held when we dismissed appellant's two prior appeals, *Bartsch II* conclusively determined that appellant has no interest in the Estate and therefore lacks

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[5] Code of Civil Procedure section 902 provides: "Any party aggrieved may appeal in the cases prescribed in this title. A party appealing is known as an appellant, and an adverse party as a respondent."

standing to prosecute an appeal. Appellant offers no explanation why the law of the case should not apply to foreclose his latest appeal.

Unlike res judicata and collateral estoppel, both of which arise after entry of final judgment in one lawsuit and the commencement of another suit, the law of the case doctrine operates within the proceedings of a single lawsuit. " 'Under the law of the case doctrine, when an appellate court " 'states in its opinion a principle or rule of law necessary to the decision, that principle or rule becomes the law of the case and must be adhered to throughout [the case's] subsequent progress, both in the lower court and upon subsequent appeal . . . .' " [Citation.] Absent an applicable exception, the doctrine "requir[es] both trial and appellate courts to follow the rules laid down upon a former appeal whether such rules are right or wrong." [Citation.] As its name suggests, the doctrine applies only to an appellate court's decision on a question of law; it does not apply to questions of fact.' " (*Investors Equity Life Holding Co. v. Schmidt* (2015) 233 Cal.App.4th 1363, 1377.) Law of the case may apply even where the appeal is from a decision "short of a full trial, including a judgment on a demurrer, a nonsuit order or [other] motion." (*Hotels Nevada, LLC v. L.A. Pacific Center, Inc.* (2012) 203 Cal.App.4th 336, 356.)

Appellant's standing has been an issue from the outset of our involvement in this matter. In *Bartsch I*, *supra*, 193 Cal.App.4th 885, we considered whether appellant had standing to appeal an interim award of attorney fees and costs incurred by Peltner. At that stage of the litigation, the probate court had not yet ruled on appellant's pretermission petition. We requested supplemental briefing concerning appellant's standing to appeal the challenged interim orders. (*Id.* at pp. 889–891.) We concluded that he had standing to appeal because, were he to prevail in the underlying action, the award of attorney fees would have placed him "at a financial disadvantage by diminishing the estate." (*Id.* at p. 891.) We also considered the fact that he had been served with notice of the petition for the award of interim attorney fees. (*Ibid*.)

Subsequently, in *Bartsch II, supra,* A135322, we affirmed the probate court's determination that appellant was not a pretermitted heir. We held that "the court properly concluded *he is not entitled to a share of the estate* as an omitted child." (*Id*. at p. *12, italics added.) This statement was a principle or rule of law necessary to our decision affirming the lower court's summary judgment ruling. This issue was finally determined over four years ago.

When we dismissed appellant's appeals in 2015, *Peltner v. Herterich, supra,* A136646, and *Herterich v. Peltner, supra,* A143565, we explained that appellant's lack of interest in the Estate was fatal to his appeals. Having no interest in the Estate, appellant cannot be aggrieved by the lower court's orders approving matters involving the Estate's administration. We noted that *Bartsch II* is the law of the case and declined appellant's invitation to revisit it.

Finally, we concluded in *Herterich* that appellant's "claims for damages in [his civil fraud action] are based entirely on representations made by defendants in connection with the probate proceedings and therefore his claims are barred by the litigation privilege under Civil Code section 47, subdivision (b)." (*Herterich, supra,* 20 Cal.App.5th at p. 1135.) This rule of law was central to our opinion affirming the grant of summary judgment in favor of Peltner and Traeg, and it, too, is law of the case.

Taken together, these points of law are determinative that appellant is not an "aggrieved party" within the meaning of Code of Civil Procedure section 902. Because he has no cognizable interest in the Estate and has suffered no legal injury from the filing of the probate petition and the related judicial proceedings, appellant has no standing to appeal the probate court's order denying his motion to set aside probate orders that were entered more than 10 years ago.[6]

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[6] It is not altogether clear why, following *Bartsch II* and our subsequent orders dismissing appellant's appeals, appellant's motions and petitions are still being entertained by the probate court. Whether appellant has since *acquired* an interest in the

"Like res judicata, the doctrine of the law of the case serves to promote finality of litigation by preventing a party from relitigating questions previously decided by a reviewing court." (*George Arakelian Farms, Inc. v. Agricultural Labor Relations Bd.* (1989) 49 Cal.3d 1279, 1291.) The time for appellant to litigate points of law that have been conclusively resolved by this court has long since passed.

II. Motion for Sanctions is Granted

As noted above, Peltner moved for sanctions against appellant for filing a frivolous appeal. Appellant opposed the motion. Although we denied Peltner's motion to dismiss, we notified the parties that the request for sanctions would be considered in conjunction with this appeal. (Cal. Rules of Court, rule 8.276(c).) This portion of our opinion constitutes the written statement of reasons required for imposition of sanctions against appellant. (See *In re Marriage of Flaherty* (1982) 31 Cal.3d 637, 654 (*Flaherty*).)[7]

A. Legal Standards

Code of Civil Procedure section 907 provides: "When it appears to the reviewing court that the appeal was frivolous or taken solely for delay, it may add to the costs on appeal such damages as may be just." Sanctions may be imposed when an appeal is prosecuted for an improper motive, such as to harass the respondent or delay finality, or when the appeal indisputably has no merit—when any reasonable attorney would agree that the appeal is totally and completely without merit. (*Kleveland v. Siegel & Wolensky,*

Estate through an "assignment of inheritance expectancy," as he now contends, is not properly before the court. The question of appellant's standing based on a purported assignment of testate distribution rights should be determined by the probate court in the first instance.

[7] *Flaherty* also requires a party to be afforded a hearing prior to imposition of sanctions. (31 Cal.3d at p. 654.) Appellant was given notice that the court was contemplating the imposition of sanctions but waived oral argument.

LLP (2013) 215 Cal.App.4th 534, 556 (*Kleveland*); see Cal. Rules of Court, rule 8.276(a)(1).)

In *Flaherty*, the Supreme Court explained the rationale for the imposition of sanctions against a party by a reviewing court: "An appeal taken for an improper motive represents a time-consuming and disruptive use of the judicial process. Similarly, an appeal taken despite the fact that no reasonable attorney could have thought it meritorious ties up judicial resources and diverts attention from the already burdensome volume of work at the appellate courts." (*Flaherty*, *supra*, 31 Cal.3d at p. 650.)

"In determining whether an appeal indisputably has no merit, California cases have applied both subjective and objective standards. The subjective standard looks to the motives of the appealing party and his or her attorney, while the objective standard looks at the merits of the appeal from a reasonable person's perspective." (*Kleveland*, *supra*, 215 Cal.App.4th at p. 556.) Whether the party or attorney acted in an honest belief there were grounds for appeal is irrelevant "if any reasonable person would agree the grounds for appeal were totally and completely devoid of merit." (*Id.* at pp. 556–557.) The objective and subjective standards "are often used together, with one providing evidence of the other. Thus, the total lack of merit of an appeal is viewed as evidence that appellant must have intended it only for delay." (*Flaherty*, *supra*, 31 Cal.3d at p. 649.)

The determination whether an appeal is frivolous should be approached with caution. Courts recognize that counsel and their clients have a right to present issues that are arguably correct, even if it is extremely unlikely that they will prevail on appeal. (*Flaherty*, *supra*, 31 Cal.3d at p. 650.) "An appeal that is simply without merit is not by definition frivolous and should not incur sanctions." (*Ibid.*, italics omitted.)

B. Analysis

We begin with the obvious ground for imposition of sanctions—this appeal is patently frivolous. *Bartsch II* settled the question that appellant was intentionally disinherited and has no interest in the Estate. Appellant evidently ignored our opinion and proceeded to challenge the probate court's orders approving payment of Peltner's attorney fees and expenses, and approving the sale of two parcels of real property owned by the Estate. In dismissing his appeals from these orders in 2015, we could not have been clearer that *Bartsch II* is the law of the case and appellant's lack of interest in the Estate deprived him of standing. (*Peltner v. Herterich*, *supra*, A136646; *Herterich v. Peltner*, *supra*, A143565.)

We also rejected appellant's contention that he has standing based on his separate civil fraud action against Peltner and Traeg. Appellant argued that if he prevailed in the fraud action, the orders admitting the will to probate must be set aside and he will have an opportunity to contest the will. We concluded that the civil fraud action did not accord him standing, explaining that appellant suffered no prejudice and was not deprived of the opportunity to challenge the will. After all, appellant intervened in the probate proceedings within four months of their commencement and has vigorously contested and objected to the administration of the Estate over the past (now) nine years.

It is the law of the case that appellant lacks standing to contest orders from the probate court, and yet appellant filed a motion to set aside the probate court's 2008 orders admitting the will to probate and appointing Peltner as executor, and then filed the instant appeal from the denial of his motion. No reasonable attorney could possibly conclude that appellant has standing to challenge the probate court's 2008 orders—particularly on grounds we *rejected* as the basis for his standing argument in 2015. We conclude it was objectively frivolous for appellant to file the current appeal.

We also find appellant's briefing on the question of standing to be devoid of any merit. In opposing Peltner's motion to dismiss the pending appeal, appellant advances

three arguments: (1) "[T]he appeal in [*Bartsch II*] did *not* decide that [appellant] has 'no beneficial interest' in Bartsch's estate; that appeal merely decided that Bartsch was aware when he signed his will that Herterich was Bartsch's child, and Herterich therefore is not a pretermitted child" (italics in original); (2) appellant has an interest in the subject of the set-aside motion and is aggrieved by the order denying it because as "intestate heir," appellant would inherit Bartsch's estate and be given priority for appointment as administrator if the probate orders had been set aside; and (3) appellant has an interest in Bartsch's estate as the assignee of a testamentary distributive share of that estate.

Appellant's first argument is a gross distortion of *Bartsch II*. In affirming summary judgment, we "conclude[d] that the trial court properly found there is no triable issue of fact as to whether decedent was unaware of objector's birth." (*Bartsch II*, *supra*, A135322, at p. *11.) But we did not end there. In the very next sentence of the opinion, we stated: "It follows that the court properly concluded *he is not entitled to a share of the estate* as an omitted child." (*Ibid*., italics added). It is hard to conceive how "not entitled to a share of the estate" can be read to mean anything other than that appellant has "no beneficial interest" in the Estate. But even if the import of this legal rule somehow escaped appellant's comprehension, no reasonable attorney could misunderstand our dismissal orders in 2015—which made clear that appellant lacks standing because he has no interest in the Estate, citing to *Bartsch II*. It is concerning that appellant would offer what seems to be a disingenuous interpretation of *Bartsch II* while completely ignoring that our subsequent orders in *Peltner v. Herterich*, *supra*, A136646, and *Herterich v. Peltner*, *supra*, A143565 refute it.

Appellant's second argument simply rehashes arguments that have been conclusively settled or rejected by this court. *Bartsch II* resolved that appellant is *not* an intestate heir; he is an heir who was known to his father and was intentionally omitted from his father's will and therefore has no claim to the Estate. *Peltner v. Herterich, supra*, A136646, and *Herterich v. Peltner*, *supra*, A143565 settled that appellant does not

have standing based on a theory that Peltner committed fraud against him or deprived him of the opportunity to contest the will. Once a legal issue has been decided on appeal, it is not open to further debate. Appellant's utter failure to analyze these orders in the context of the law of the case falls short of counsel's professional duty of candor and to raise pertinent legal authorities. (See *Kleveland, supra*, 215 Cal.App.4th at p. 559 ["One of an attorney's duties is to employ only those means that are consistent with truth and never to seek to mislead us 'by an artifice or false statement of fact or law.' (Bus. & Prof. Code, § 6068, subd. (d).)"].)

Finally, appellant advances a new theory that he has obtained standing through an assignment of testate distribution rights from a beneficiary of the Estate. Appellant cites to his request for judicial notice of exhibits he filed with the court below, including an exhibit that purports to be an assignment of interest to him. Appellant overlooks that while we granted in part his request for judicial notice as to the existence of court records, we *denied* his request to the extent it sought judicial notice as to the truth of any matters stated therein—exactly what he seeks improperly to do here. (See Evid. Code, § 452, subd. (d); Simons, Cal. Evidence Manual (2019) § 7.12, pp. 599–601.) In any event, this filing reveals that the assignment occurred *after* the notice of appeal was filed herein. It is well established that a reviewing court may not give any consideration to alleged facts that are outside of the record on appeal. (*CIT Group/Equipment Financing, Inc. v. Super DVD, Inc.* (2004) 115 Cal.App.4th 537, 539, fn. 1.)

It is equally clear appellant has pursued the instant appeal for the improper purpose of harassing and causing delay in the distribution of the Estate, which has now been in probate for 10 years. Appellant has thoroughly, and unsuccessfully, litigated his objections to the Estate for close to a decade and is now onto his *sixth* appeal. His siege on the Estate has had deleterious consequences. Reportedly, some of the Estate's elderly beneficiaries have passed away, having never received their bequests. By one estimate, more than one-sixth of the value of the Estate may have been depleted by attorney fees

and costs driven from appellant's barrage of litigation.[8] Appellant has now filed three more appeals in this matter. In the court below, he has sought unsuccessfully to block the payment of fees and costs by the Estate, to block the sale of real property by the Estate, to remove the executor, and to stay the distribution of the Estate, among other failed pursuits. It is all the more notable that he engages in this type of litigation when this court has already concluded that appellant has no standing. One can only assume that he is pursuing an aggressive litigation strategy for the improper purposes of delaying the effect of the court's judgments, wearing down Peltner and the beneficiaries of the Estate, or depleting the Estate to the point that there is nothing left. Sanctions are warranted to deter this improper behavior.

As to the amount of sanctions, Peltner's counsel stated in his declaration that he spent 17 hours preparing the motion to dismiss this appeal, billed at a rate of $350 per hour. From this we calculate a total of $5,950. We conclude that amount is appropriate as sanctions for appellant's conduct in filing this frivolous appeal and advancing frivolous arguments.

DISPOSITION

Having found appellant lacks standing to appeal the denial of his motion to set aside the probate court's December 2008 orders admitting Bartsch's will to probate and appointing Peltner as executor, we conclude this appeal must be dismissed.

As sanctions for bringing this frivolous appeal, appellant and his attorney Carleton L. Briggs, jointly and severally, shall pay $5,950 to Peltner, in Peltner's capacity as executor. Sanctions shall be paid no later than 15 days after the date the remittitur is issued.

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[8] In 2014 the Estate was valued at $3.2 million. The probate court approved payment of attorney fees and costs through February 2012 in the amount of $173,058, a further request for fees and costs through October 2016 has been submitted totaling $309,833, and Peltner contends he has incurred $34,195 from this latest appeal alone (for a total of $517,086 to date).

Attorney Carleton L. Briggs and the clerk of this court are each ordered to forward a copy of this opinion to the State Bar upon return of the remittitur. The clerk of this court shall also notify attorney Carleton L. Briggs that this matter has been referred to the State Bar. (Bus. & Prof. Code, §§ 6086.7, subd. (a), 6068, subd. (o)(3).)

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Sanchez, J.

We concur:

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Margulies, Acting P. J.

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Banke, J.